Northern Pacific Sealcoating, Inc., Petitioner *and* Laborers' International Union of North America, Local 270, AFL–CIO. Case 32–RM–676

December 9, 1992

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 23, 1991, the Regional Director for Region 32 administratively dismissed the instant RM petition, concluding that the Employer had waived its right to file a petition covering the represented employees. Thereafter, in accordance with Section 102.67(b) of the Rules and Regulations of the National Labor Relations Board, the Employer filed a timely request for review of the Regional Director's dismissal of the petition.

The National Labor Relations has delegated its authority in this proceeding to a three-member panel.

For the reasons set forth below, we grant the Employer's request for review and, on review, affirm the Regional Director's dismissal of the petition. We find that by virtue of the waiver provision contained in the memorandum agreement between the Employer and the Union, the Employer effectively waived its right to file a representation petition.

The relevant facts are undisputed. The Employer is a licensed general contractor engaged in the business of onsite construction. On December 29, 1988, the Employer entered into an 8(f) relationship with the Laborers' Union (the Union) by executing a memorandum agreement binding it to the then-current Laborers' master agreement.[1] The memorandum agreement executed by the Employer contained a termination provision which required the parties to give written notice of an intention to terminate, change, or cancel the agreement not more than 90, nor less than 60, days prior to the June 30, 1989 expiration date of the contract, or June 30 of any year in which the master agreement would terminate. There was no evidence that the Employer ever provided any notice of an intention to cancel, modify, or terminate the contract with the Union. Consequently, the Employer became bound to the terms and conditions contained in successive master agreements, the most recent of which is effective from January 1, 1989, through June 30, 1993.

The memorandum agreement signed by the Employer also contains the following provision:

> It is the intention of the undersigned to enforce the provisions of this Agreement only to the extent permitted by law. Except as set forth below, the individual employer waives any right that he or it may have to terminate, abrogate, repudiate or cancel this Agreement during its term, or during the term of any future modifications, changes, amendments, supplements, extensions, or renewals of or to said Master Agreement; or to file or process any petition before the National Labor Relations Board seeking such termination, abrogation, repudiation or cancellation.

The Regional Director found that the waiver provision in the agreement was clear and unequivocal, and that it was not contrary to Board policy as neither party contended that the employees were precluded from filing a petition. The Regional Director therefore dismissed the petition, noting that the fact the waiver was not explicitly discussed with the Employer did not negate the waiver's validity. The Employer argues that enforcing such a waiver is inconsistent with the Board's decision in *John Deklewa & Sons*,[2] under which signatory parties to an 8(f) contract are permitted to file a petition anytime during the term of the contract; that enforcing the waiver would, in effect, convert the 8(f) agreement into a 9(a) agreement; and that signing a contract containing such a boilerplate waiver does not constitute the ''conscious'' relinquishment of a right, which the Board requires to find an effective waiver.

The Board has long recognized that parties to collective-bargaining agreements may waive certain of their rights, including some fundamental statutory rights. The Board has generally enforced such waivers when they are clear, knowing, and unmistakable, whether they be by contractual provision or by conduct.[3] In the instant case, there is no dispute regarding what the Employer agreed to waive: signatory parties to an 8(f) contract ordinarily have the right under *Deklewa* to file a petition anytime during the term of the contract.[4] The waiver provision in the memorandum agreement clearly and unmistakably provides that the Employer agreed to waive its right to file a petition (as well as agreeing not to resort to Board processes to terminate

[1] There is no evidence, or claim, that the Employer recognized the Union based on a demonstrated showing of majority support, as required in the construction industry to establish 9(a) status. See *J & R Tile*, 291 NLRB 1034, 1036 (1988).

[2] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[3] *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983). See, e.g., *Gem City Ready Mix Co*., 270 NLRB 1260, 1261 (1970) (waiver of prestrike seniority); *Texaco, Inc*., 291 NLRB 613 (1988) (union waived disabled employees' right to receive accrued accident and sickness benefits during strike); *Gulf Oil Co*., 290 NLRB 1158 (1988) (employer's discontinuance of sickness and accident benefits during a strike not a violation because the union clearly intended to waive any contractual claim to those benefits in back-to-work agreement); *Sun World, Inc*., 271 NLRB 49 (1984) (employer, by its conduct, waived a defense that the collective-bargaining agreement had automatically renewed); *Lange Co*., 222 NLRB 558 (1976) (union waived its right to bargain about layoffs and transfers by not timely requesting bargaining).

[4] *Deklewa*, 282 NLRB at 1385.

the contract), and the waiver provision was executed by the Employer well after the Board issued its decision in *Deklewa*. Consequently, the Employer knew, or should have known, the nature of the rights it agreed to waive at the time it signed the memorandum agreement. Thus, we are satisfied that the waiver was clear and unmistakable and that the Employer knowingly relinquished its right to file a petition.

The Board has not, until now, addressed the validity of a waiver of an *employer's* right to file a petition. We find, however, that enforcing such a waiver is neither contrary to Board policy nor contrary to the Act.[5] In *Briggs Indiana Corp.*,[6] the Board enforced an express contractual agreement by the union to forego its right to represent or seek to represent certain of an employer's employees.[7] The Board there stated that ''the exercise of the right of given employees to choose any representative they desire is never literally unrestricted,'' and reasoned that the Act neither gave employees an unqualified right to membership in a particular union nor prevented a union from declining to organize and represent certain employees.[8] We find that the issue here is analogous to that presented in *Briggs Indiana*. Since the Board will, as *Briggs Indiana* and its progeny hold, enforce a union's waiver of its right to represent certain employees, it seems to us that the logical corollary of that proposition is that the Board should enforce an employer's waiver of its right to challenge the union's representation of certain employees during the term of the particular contract involved.

Finally, we are reluctant to permit parties to use Board processes in a manner contrary to their contractual commitments or obligations. In reaffirming the *Briggs Indiana* doctrine, the Board in *Allis-Chambers Mfg. Co.*[9] noted that it was unwilling to lend government sanction to undo the terms of a bargain which the parties themselves had struck, as such a result would be contrary to the statutory policy directed toward stabilizing the collective-bargaining relationship. Similarly, in *Montgomery Ward & Co.*,[10] the Board held that the parties' 5-year collective-bargaining agreement served to bar the employer's petition, even though the term of that agreement exceeded the 3-year maximum permitted by the Board's contract bar doctrine. The Board reasoned that:

> [W]e cannot interpret our contract-bar rules in such a way as to permit employers [and] certified unions to take advantage of whatever benefits may accrue from the contract with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election.[11]

Further, the Board noted that it had not in the past permitted a party to avoid valid commitments or obligations in other respects through the use of the Board's processes, and there was no reason to conclude that a different rule should be applied to petitions by the contracting parties.[12]

In the instant case, although the Employer may not have actually participated in bargaining over the initial inclusion of the waiver provision at issue, the Employer did sign the short memorandum agreement which included the waiver provision at issue. Permitting the Employer now to use the Board's processes to obtain an election would allow the Employer to avoid the terms and conditions of an otherwise valid contract it voluntarily signed. Moreover, as we noted above (infra at fn. 5), and as was the case in *Montgomery Ward*, our decision to enforce the waiver does not affect the rights of employees or outside unions to file representation petitions.

Accordingly, for the reasons stated above, we find that the Employer waived its right to file the instant petition, and, therefore, affirm the Regional Director's dismissal of the petition.

ORDER

The Regional Director's administrative dismissal of the instant petition is affirmed.

[5] The Employer's argument that enforcing the waiver provision in effect ''converts'' the 8(f) contract into a 9(a) contract, contrary to the teachings of *Deklewa*, is clearly without merit. The contractual restriction on the Employer's right to file a petition does not establish 9(a) status. For example, the restriction does not affect employees' right to file a decertification petition (or other unions' right to file a representation petition) during the term of the collective-bargaining agreement, as would be the case if a 9(a) agreement was involved; similarly, upon the expiration of the instant contract, there will be no presumption of continued majority status, as there would be if a 9(a) agreement was involved.

[6] 63 NLRB 1270 (1945).

[7] See also *Cessna Aircraft Co.*, 123 NLRB 855 (1959).

[8] 63 NLRB at 1272.

[9] 179 NLRB 1, 3 (1969).

[10] 137 NLRB 346 (1962).

[11] Id., 137 NLRB at 348–349 (footnotes omitted).

[12] Id. at 349 fn. 7.